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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 FREDERICK L. WINFIELD, et al.,
5 Plaintiff,

6 v.
7 CITIBANK, N.A.,
8 Defendant.

10 CV 07304 (JGK)

5 DIGNA RUIZ, et al.,
6 Plaintiff,

7 v.
8 CITIBANK, N.A.,
9 Defendant.

10 CV 05950 (JGK)

9 New York, N.Y
10 March 27, 2012
11 2:43 p.m.

12 Before:

13 HON. JOHN G. KOELTL,

14 District Judge

15 APPEARANCES

16 RIGRODSKY & LONG, P.A.
17 Attorneys for Plaintiff
18 BY: Timothy John MacFall
19 Gregory M. Egleston
20 Scott Jason Farrell
21 Murielle Steven Walsh

22 MORGAN LEWIS AND BOCKIUS, LLP
23 Attorneys for Defendant
24 BY: THOMAS ANTON LINTHORST

C3R0WINC

1 (In open court)

2 THE COURT: Good afternoon, all. Please be seated.

3 MR. MacFALL: Good afternoon, your Honor. Timothy
4 McFall, on behalf of the plaintiff.

5 THE COURT: I'm sorry?

6 MR. MacFALL: Timothy McFall on behalf of the
7 plaintiffs in the Winfield case.

8 THE COURT: Okay, thank you.

9 MS. STEVEN WALSH: Good afternoon, your Honor,
10 Murielle Steven Walsh on behalf of plaintiff Ruiz.

11 MR. EGLESTON: Good afternoon, your Honor, Gregg
12 Egleston, on behalf of plaintiffs.

13 MR. FARRELL: Good afternoon, your Honor, Scott
14 Farrell, on behalf of plaintiffs.

15 MR. LINTHORST: Good afternoon, your Honor, Thomas
16 Linthorst, on behalf of defendant.

17 THE COURT: Okay, good afternoon.

18 The purpose of the conference today is just to talk
19 about a few differences on the notice. There were about four
20 or five differences on the notice. I wanted to call you in in
21 order to get this done as quickly as possible, so that the
22 notice can be sent out, because I know that the clock is
23 ticking.

24 Let me just make an observation. There are not a lot
25 of issues here, there are just a few. And I'm prepared to

C3R0WINC

1 decide them. There are four attorneys for plaintiffs here. I
2 realize that there are two cases, but I may eventually have to
3 approve, I don't know, an attorneys fee in this case. Four
4 attorneys to deal with issues with respect to a notice are
5 thoroughly unnecessary. There are two cases, so perhaps two
6 lawyers. I hope, if I ever have to approve an attorneys fee, I
7 am never asked to approve attorneys fees for more than two
8 lawyers for a court conference.

9 Now, to deal with the issues on the notice.

10 The parties disagree with respect to the appropriate
11 length of time for the opt-in period. The defendants say it
12 should be 60 days. The plaintiff says it should be 90 days.
13 Courts in this circuit generally approve 60 days. But if there
14 are special reasons, courts approve 90 days.

15 In this case, the plaintiffs make a fair argument that
16 the potential plaintiffs in the class may have left Citibank
17 and that there may be difficulty locating them, and the
18 potential difficulty justifies a 90 day opt-in period in this
19 case. And I find that argument persuasive.

20 The second issue is the defendants want to add
21 additional language concerning the consequences of
22 decertification. The plaintiffs have agreed to language
23 explaining that no final decision in the case has been made,
24 and that the case may later be decertified.

25 This language is sufficient to apprise potential

C3R0WINC

1 opt-ins of the possibility of decertification. The additional
2 language proposed by the defendant is unnecessary, and could
3 prove confusing.

4 So, dealing with the language, which is at the bottom
5 on the first page of the proposed notice that was sent to me,
6 with the Pomerantz letter, I would, in the final paragraph on
7 that page, the second sentence of the final paragraph reads:

8 The Court has only made a preliminary determination
9 that personal bankers should receive notice of the action and
10 the opportunity to join.

11 You should add: The collective action under the FLSA.

12 And then the next sentence is: No final decision has
13 been made and this case may later be decertified.

14 That's fine. And there is no objection to that.

15 And the next sentence is unnecessary and should be
16 stricken, if this motion is later decertified, etc.

17 Okay. The third issue, the defendant argues that the
18 collective action notice should not include language stating
19 that federal law prohibits retaliation by Citibank. That's on
20 the third page of the notice under Section 7. No retaliation
21 permitted. That language is commonplace in collective action
22 notices, and is appropriate to ensure that current employees of
23 Citibank who may wish to opt-in are not deterred from
24 participating in the lawsuit.

25 Citibank objects that the language is unnecessarily

C3R0WINC

1 pejorative to Citibank. It suggests that CitiBank somehow may
2 retaliate. Citibank says it will never retaliate. But the
3 language really doesn't imply that Citibank is going to
4 retaliate. It simply provides the standard assurance to
5 employees that there will be no retaliation. And so the
6 language is appropriate.

7 The fourth issue, is the issue of attorneys fees.
8 Again, on the third page, the defendant wants to include
9 language indicating that the plaintiff's counsel reserves the
10 right to request a certain percentage of any settlement
11 obtained, or money judgment entered, in the case. The
12 plaintiffs object and want to put a period in the sentence
13 after attorneys fees. So the plaintiffs would say: Only if
14 there is a recovery, the attorneys for the main plaintiffs will
15 apply for Court approval for attorneys fees.

16 Some greater disclosure is appropriate. More
17 information is appropriate so that plaintiffs can understand
18 what the nature of the potential attorneys fees are. Is there
19 a retainer agreement that applies for the amount of the
20 percentage of attorneys fees that the plaintiffs are going to
21 seek?

22 MS. STEVEN WALSH: Yes, your Honor.

23 THE COURT: And what is it?

24 MS. STEVEN WALSH: It's that we would seek no more
25 than a third of the recovery.

C3R0WINC

1 THE COURT: Okay. Well, the defendant's proposal is
2 not right, because the defendants propose that the language
3 would say that the attorneys for the named plaintiffs will
4 receive blank percentage of any settlement.

5 MR. LINTHORST: Your Honor, I just wanted to clarify.
6 I think we had a -- the language we really seek is in our
7 letter. It didn't translate accurately to the notice. So
8 plaintiffs counsel reserve the right to request up to blank
9 percent of any settlement obtained or money generated.

10 THE COURT: Okay. I was going to suggest that: The
11 attorneys for the named plaintiffs will seek from the Court one
12 third of any settlement obtained, or money judgment entered, in
13 favor of the plaintiffs.

14 And, the addition of an additional line which says:
15 Any award of attorneys fees is subject to review and approval
16 by the Court.

17 Is that language -- is that language acceptable?

18 MR. LINTHORST: Yes, your Honor.

19 MS. STEVEN WALSH: Yes, your Honor.

20 THE COURT: Okay.

21 Then the next issue is the defendants sought language
22 that the plaintiffs may be required to testify in New York.
23 That language is unnecessary, because it's highly speculative
24 whether the individual plaintiffs may, in fact, be required to
25 testify in New York. And the comment may well discourage

C3R0WINC

1 putative class members from opting into the class when, on the
2 basis of a speculative fear which is, in fact, not realistic.
3 So that language doesn't have to be included.

4 Six, the defendants seek to add language in the
5 introduction to the listing of the defendant's counsel to the
6 effect that: If you would like to provide information to
7 Citibank on a voluntary basis and have not returned consent to
8 join form, you may contact counsel for Citibank at the address
9 that is listed.

10 That language is unnecessary for the notice, for
11 obvious reasons. If people want to contact the lawyers for
12 Citibank, they are there, they are listed, they are welcome to.
13 The notice is not intended to be a solicitation for additional
14 contacts with defense counsel. It is completely neutral to
15 list defense counsel. And anyone who wants to contact defense
16 counsel at that address or telephone number is welcome to do
17 so.

18 Finally, there is the issue of the information to be
19 provided with respect to potential opt-ins who may not have
20 timely claims under the FLSA, but may have timely claims under
21 New York law, and may be members of the class, but not of the
22 collective. And some language is appropriate, but not all of
23 the language that defendants suggest.

24 So under who can join, certainly the first sentence
25 which the plaintiffs object to is wholly reasonable: If you

C3R0WINC

were employed by Citibank in New York starting on or after August 6th, 2004, but left the company prior to August 6, 2007, you are not eligible to opt-in to the FLSA claims. And this notice is for informational purposes only.

That is a correct statement of the law, right? Yes? Plaintiffs, right?

MS. STEVEN WALSH: Your Honor, it is technically a correct statement of the law, but we think it is misleading. We think an average layperson is going to read this language and think I don't have an FLSA claim, so I shouldn't do anything, I shouldn't contact plaintiff's counsel, tell them my story, nothing.

THE COURT: You know, the problem I have is that's a correct statement of law, right? It's not -- it's a correct statement of the law, right?

MS. STEVEN WALSH: Well, I would say that --

THE COURT: What's going to happen is, if you want me to reconsider the issue of sending out notice to people for a six-year period because it may provide information for the class, even though these are not people who have -- there are some people here who do not have the right to opt-in if they left and were not employees within the possible three-year period. If you want me to reconsider sending out the notice for the six-year period, then I'm sure the defendants would be happy to have me reconsider that.

C3R0WINC

1 The notice has to be fair, and it has to be accurate.
2 It can't be misleading. That, I think you agree, is a correct,
3 fair statement of the law. And so people should be advised
4 about that in a fair and neutral way.

5 Another way of dealing with this is just send out the
6 notice to the people who were employed in the three-year
7 period, and don't even bother sending it out to people going
8 back 6 years. If you want me to do that, that's an option.
9 And I can do that. The Courts are divided under that. I
10 think, and I think experience shows, that sending out the
11 notice for the six-year period is better. But if you want to
12 avoid any confusion or anything, we can just make this very
13 clearly only opt-in, and we can deal with the issue of the
14 class, down the road.

15 Do you want plea to do that?

16 MS. STEVEN WALSH: No.

17 THE COURT: No, I didn't think so.

18 Is the sentence accurate?

19 MS. STEVEN WALSH: Yes.

20 THE COURT: Fair statement of the law?

21 MS. STEVEN WALSH: Yes, it is.

22 THE COURT: Then that's what we'll do.

23 I don't understand the next sentence. The sentence is
24 crossed out. Is it a real issue? I mean the plaintiffs don't
25 want it.

C3R0WINC

1 If you have already brought a lawsuit against Citibank
2 for failure to pay overtime wages owed to you, you may not be
3 eligible for this lawsuit.

4 And I don't recall that there is a big discussion
5 about it in the papers.

6 MR. LINTHORST: Yeah, I don't believe we did discuss
7 this specifically. I think it's an accurate statement that, if
8 asserted, your FLSA claim somewhere else, or already asserted
9 it and compromised it, then you may not be eligible to
10 participate here.

11 THE COURT: But are there any people that you know of
12 who did that?

13 MR. LINTHORST: I can't cite anyone here, but there is
14 a lot of people that we're talking about around the country
15 going back several years, so it is certainly possible.

16 THE COURT: What's the plaintiff's position on that
17 sentence?

18 MS. STEVEN WALSH: We're unaware of anybody who had
19 overtime --

20 We are unaware of any other personal bankers who
21 have --

22 We are unaware of any individual cases by personal
23 bankers who have overtime claims.

24 I mean there is a case that's pending in California.
25 That's all we're aware of, but we're not --

C3R0WINC

1 THE COURT: The people in -- is it true, by the way,
2 that if you brought a lawsuit, and if the lawsuit had not been
3 resolved yet, that you're then ineligible to opt-in to this
4 class?

5 MR. LINTHORST: I believe it would be true, because
6 you would be splitting your claim. If you have a claim for
7 overtime for an hour of work, you don't get to file one legal
8 theory for that overtime, and in one court, and separately in a
9 different court.

10 THE COURT: Even before there has been a decision?

11 MR. LINTHORST: Yes. Under a claim-splitting theory,
12 res judicata has not yet attached but, still, we don't want two
13 courts deciding the same question.

14 THE COURT: The people in California, are they
15 precluded from opting into this action?

16 MS. STEVEN WALSH: No.

17 MR. LINTHORST: My understanding of the California
18 case, and I'm not counsel in that case, but I believe that
19 there is at least one or two actions. If you are a named
20 plaintiff and you have asserted your claim in California court,
21 I believe that you should assert all of your claims arising
22 from your transactional event in that court.

23 THE COURT: Well, it would seem to me that if there is
24 a dispute, the place to resolve the dispute is if a person opts
25 in to this class, and they shouldn't opt in, then they can be

C3R0WINC

1 stricken without advising them at the outset on a subject that
2 the parties disagree with and that wasn't really raised in the
3 in the correspondence.

4 So I would take out that sentence, If you have already
5 brought a lawsuit.

6 On the other hand, it's unnecessary to repeat, again,
7 in the Please Note section, the sentence: Individuals in New
8 York who have timely New York State law claims, but do not have
9 timely FLSA claims, may not opt-in to the FLSA claims. Having
10 laid out the principle ones, it's not necessary to repeat it.

11 And it's not necessary to include the additional
12 language which the plaintiffs would cross out on the bottom of
13 section -- on the bottom of the third page, or second page
14 under effect of joining the suit: In addition if you file a
15 consent to join a collective action form, your continued right
16 to participate will depend upon a later decision of the Court,
17 et cetera. I don't see any reason to include it. And it could
18 well be confusing.

19 I think that deals with all of the objections and
20 suggestions. Anything else?

21 MR. LINTHORST: Not from defendant, your Honor.

22 MS. STEVEN WALSH: Your Honor, I have one
23 clarification question.

24 In terms of the language regarding depositions in New
25 York, were you suggesting that we take out the reference to any

C3R0WINC

1 need for deposition, or just that the deposition will take
2 place in New York?

3 THE COURT: It was meant to take out any
4 depositions --

5 MS. STEVEN WALSH: Okay.

6 THE COURT: -- frankly.

7 MR. LINTHORST: Your Honor?

8 THE COURT: Yes.

9 MR. LINTHORST: The only issue that we were discussing
10 was whether or not they would have to testify in Court in New
11 York. And the Court ruled that we would take it up.

12 THE COURT: No, I know that. Direct me to language --
13 oh, I'm sorry, no. No, you're right. I mean the --

14 MR. LINTHORST: As I understood it, we were just --

15 THE COURT: No, no. I had understood the plaintiff to
16 be objecting specifically to the concept of testimony in New
17 York as unnecessarily burdensome on the plaintiffs and possibly
18 discouraging to the plaintiffs. And the proposed notice that
19 the plaintiffs gave me, struck only, quote, "in New York," from
20 the paragraph about the possible obligations of the plaintiff.
21 And I think that's fair. So it's only "in New York" that is
22 stricken.

23 MS. STEVEN WALSH: Thank you.

24 THE COURT: All right.

25 No other questions about the notice, right?

C3R0WINC

1 MR. LINTHORST: Correct, your Honor.

2 MR. MacFALL: Correct, your Honor.

3 THE COURT: Yeah. And from the plaintiffs, no other
4 questions, objections, problems?

5 MS. STEVEN WALSH: No, your Honor.

6 THE COURT: Okay.

7 How is the case going?

8 MS. STEVEN WALSH: It's moving.

9 THE COURT: Refresh my recollection on whether I
10 suggested that you speak with the magistrate judge.

11 MS. STEVEN WALSH: Yes, you did, your Honor. And we
12 have already had a conference before Judge Katz. And we have
13 established deadlines for discovery and for defendant's motion
14 for decertification, if they choose to file one.

15 THE COURT: And you spoke to the magistrate judge
16 about the possibility of settlement? Or no.

17 MS. STEVEN WALSH: Yes, we did. We addressed it very
18 briefly.

19 THE COURT: You did. And that was unsuccessful?

20 MS. STEVEN WALSH: Unfortunately, yes.

21 THE COURT: Because you're still here.

22 MS. STEVEN WALSH: Yes. That's right.

23 THE COURT: Okay.

24 Is there anything further that you need from me in
25 order to help you with the progress of the litigation?

C3R0WINC

1 MS. STEVEN WALSH: No, your Honor.

2 MR. LINTHORST: No, your Honor.

3 THE COURT: Okay. Always good to see you.

4 MR. LINTHORST: Thank you your Honor.

5 MR. MacFALL: Thank you, your Honor.

6 MS. STEVEN WALSH: Thank you, your Honor.

7 THE COURT: But not so many of you.

8 MR. MacFALL: Understood.

9 (Adjourned)

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